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SUPREME COURT OF THE UNITED STATES

GEORGE LESTER BALL, ET AL., - Petitioners,

versus

EASTERN COAL CORPORATION, ET AL., Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

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GEORGE LESTER BALL, ET AL., - - *Petitioners,*

v.

EASTERN COAL CORPORATION, ET AL., - *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

The petitioners pray that a Writ of Certiorari issue to review the decision of the Court of Appeals of Kentucky in this case.

OPINION BELOW.

On March 24, 1967, the Court of Appeals of Kentucky announced the decision sought to be reviewed and its opinion is published in 415 S. W. 2d 620-627. It is appended (Appendix D, p. 48). Petition for rehearing was denied on June 30, 1967.

JURISDICTION.

Petitioners claim jurisdiction to grant certiorari is conferred by 28 USC 2101(c) and by the Labor Management Relations Act, 1947, Section 301(a), codified as 29 USC 185.

QUESTIONS PRESENTED.

The following questions are to be presented by this petition:

1. Where an employer engaged in an industry affecting commerce, as defined in Labor Management Relations Act, 1947, has a contract with a labor organization representing his employees in that industry may the officers or the majority of the members of a local union waive, abrogate and deprive a minority of employee members of their seniority rights under the existing collective bargaining agreement; there being no new agreement and no amended or supplemental agreement to support such privation.

2. Did officers of Labor Union 5737 of the United Mine Workers of America have authority to enter into a local seniority agreement involving job or mine senority, while the parties were under the terms and conditions of the "National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952, and as amended thereafter."

3. The further question presented is whether the provision for "Management of Mines," as set out in the collective bargaining agreement above referred to, gave the employer the authority to determine the number of mines that it would operate, and the authority to assign its employees to work in the mines so designated.

4. The final question to be presented is did the Court of Appeals of Kentucky misapply the principles of Aeronautical Lodge v. Campbell, 337 U. S. 512, 93

L. Ed. 1513, 69 S. Ct. 1287 (1948); Ford Motor Company v. Huffman, 345 U. S. 330, 97 L. Ed. 1048, 73 S. Ct. 681 (1952) and Humphrey v. Moore, 94 S. Ct. 363, 375 U. S. 335 (1964), in this case.

STATUTE INVOLVED.

The rights claimed by the petitioners were created by the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952.

The Labor Management Relations Act, 1947, declares the policy of the United States to protect such rights in the portion of the act codified as 29 USC 141(b), which says in part:

> "It is the purpose and policy of this Act in order to promote the full flow of Commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, ..."

STATEMENT OF THE CASE.

Before proceeding with the facts involved it is proper to point out that the original complaint in the Court of first instances relied upon the Labor Management Relations Act, 1947 (Transcript, Kentucky Court of Appeals, p. . . . .). The decision of the Court of first

instances specially undertook to apply the principles of Humphrey v. Moore, 375 U. S. 335, 84 S. Ct. 363), (Appendix "H", p. 56), and Court of last resort in Kentucky, in ruling on the case, held specially that "This action, though brought in a State Court, comes within the ambit of Section 301(a) of the Labor Management Relations Act of 1947, 29 USCA Section 185(a), and is controlled by federal law" (Appendix "H", p. 55).

Eastern Coal Corporation, a corporation created and existing under the laws of the State of West Virginia, and authorized to do business in the Commonwealth of Kentucky owned and operated certain coal mines in Pike County, Kentucky. In 1954, Eastern Coal Corporation operated its mines Nos. 4 and 8 both being located at McAndrews, Kentucky, and its Mine No. 7, located at McVeigh, Kentucky.

Prior to April 1954, each of the plaintiffs was an employee of Eastern Coal Corporation—some being employed at Eastern's Mine No. 4, and some being employed at Eastern's Mine No. 8.

Plaintiffs were members of the United Mine Workers of America, the latter being their exclusive bargaining agent, and Eastern was signatory to the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952, hereinafter referred to as the "Agreement."

The agreement rules all of the parties hereto.

Some of the provisions are so vital in this case that we now quote them and with the indulgence of the court shall later repeat them.

"MANAGEMENT OF MINES.

"The management of the mine, the direction of the working force, and the right to hire and discharge are vested exclusively in the operator, and the United Mine Workers of America shall not abridge these rights." (Emphasis ours.) (See pp. 8, 33 and 60, of Agreement—United Mine Workers of America—District 30—Big Sandy—1941-49 through Sept. 30, 1968, and amendments attached hereto, and made a part hereof.)

This provision was carried forward and made a part of the National Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952, and in all subsequent supplemental agreements and amendments to the Agreement to date.

This Agreement also provided:

"DISTRICT AGREEMENTS.

"This Agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by reference; *and all local agreements, rules, regulations and customs heretofore established in conflict with this agreement are hereby abolished.* Prior practice and customs not in conflict with this agreement may be continued, but any provisions in District or Local Agreements providing for the levying, assessing or collecting of fines or providing for 'no strike,' 'indemnity' or 'guarantee' clauses or provisions are hereby expressly repealed and shall not be applicable during the terms of this agreement.

"Wherever a conflict arises between this Agreement and any Local or District Agreement, this Agreement shall prevail. When day men are

transferred to loading coal the individual affected, if aggrieved, shall have the right of review under settlement of disputes procedures provided for in this Agreement.

"*No District Contract or Agreement negotiated hereinafter shall become effective until approval of such contract by the International Union, United Mine Workers of America, has first been obtained.*" (Emphasis ours.) (See p. 74 of "Agreement United Mine Workers of America—District No. 30—Big Sandy—1941-49—through Sept. 30, 1968 and Amendments.")

This provision was carried forward and made a part of the 1951 Amendment, and of the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952.

This Agreement also provided:

"SETTLEMENT OF LOCAL AND DISTRICT DISPUTES.

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately:

"1. Between the aggrieved party and the mine management.

"2. Through the management of the mine and Mine Committee.

"3. Through District representatives of the United Mine Workers of America and a commis-

sioner representative (where employed) of the coal company.

"4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

"5. Should the board fail to agree the matter shall, within thirty (30) days after decision by the Board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expeditiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement (R. 59-62)." See pp. 74 and 75 of Agreement—United Mine Workers of America—District 30—Big Sandy—1941-49 through Sept. 30, 1968 and amendments.)

This Agreement also provides:

"1. Seniority in principle and practice shall be recognized in the industry.

"2. In all cases where the working force is to be reduced, employees in each job classification at a mine with the least service, shall be laid off first.

"3. Employees who are idle because of a reduction in the working force shall be placed in a

panel from which they shall be returned to employment on the basis of seniority.

"4. Seniority established by the employees previous to the layoff shall be retained and continued upon re-employment from the panel.

"5. The re-employment of any idle person in a new classification is recognized fully providing such person is qualified and is entitled otherwise to the position by reason of his seniority.

"6. The superintendent of the mine and the secretary of the local union shall be joint custodians of the panel record.

"7. *In two or three shift operations the question of seniority with regard to work on the repective shifts shall be left to the discretion of the contracting parties at the mine in question.*

"8. GRIEVANCES under the seniority arrangements shall be handled in the usual way under the machinery of the contract providing for the consideration and disposition of grievances.

"9. Any person in the panel list who secures casual or intermittent employment during the period when no work is available for him at the operation shall in no way jeopardize his seniority rights while engaged in such temporary employment. However, any person on the panel list who secures regular employment at another operation, or outside the industry, and does not return to work when there is available employment at the mine for those in said panel, shall sacrifice his seniority rights at the operation and shall have his name removed from the panel list." (Emphasis ours.) (See pp. 82 and 83 of Agreement—United Mine Workers of America—District 30—Big Sandy—1941-49 through Sept. 30, 1968 and amendments.)

Prior to 1952, neither of the mines involved here were connected by underground haulway or otherwise. Eastern's Mine No. 4 and 8, were and are now located at McAndrews, Kentucky. Eastern's Mine No. 7, was and is now located at McVeigh, Kentucky, approximately two (2) miles distant from McAndrews, Kentucky.

Before 1952, the coal mined at Eastern's Mine No. 4 and its Mine No. 8, was processed in a tipple located at McAndrews, Kentucky. Coal mined at Eastern's Mine No. 7, was processed in a tipple located at McVeigh, Kentucky.

During the year 1952, Eastern Coal Corporation erected a modern cleaning plant at McAndrews, Kentucky. Coal mined at Eastern's Mines Nos. 4 and 8, was processed in the central cleaning plant located at McAndrews, Kentucky.

In the same year Eastern Coal Corporation began driving an underground haulway between its mine No. 7, at McVeigh, Kentucky, and its Mine No. 8, at McAndrews, Kentucky. In constructing the underground haulway, Eastern drove through its old No. 5 Mine located at Pinsonfork, Kentucky, and into its Mine No. 8 located at McAndrews, Kentucky.

The project was completed on or about the 17th day of May, 1953. Upon completion of the underground haulway between the Mine No. 7 and Mine No. 8, Eastern abandoned its tipple at Mine No. 7, at McVeigh, Kentucky, and began transporting coal mined at its Mine No. 7, through the underground haulway and began processing the coal so mined at its Mine

No. 7, in its central cleaning plant located at McAndrews, Kentucky.

These plaintiffs were employed by Eastern Coal Corporation long before May 1953, at its Mines Nos. 4 and 8, and assigned to work in said Mines in various job classifications.

During the month of June 1953, Eastern began transferring some of its employees from its No. 7 Mine at McVeigh, Kentucky, to its Mines Nos. 4 and 8 located at McAndrews, Kentucky.

On or about the 16th day of June 1953, District Seventeen (17) of the United Mine Workers of America caused the charter of Local Union No. 5729, to be surrendered, and the employees transferred from Eastern's Mine No. 7 to its mines Nos. 4 and 8, and the employees remaining in Eastern's Mine No. 7, became members of Local Union No. 5738.

On or about the 31st day of March, 1954, Eastern Coal Corporation began reducing its working forces at its Nos. 4 and 8 Mines.

In reducing its working forces Eastern used *the payroll seniority plan in lieu* of the mine seniority plan as provided for in the contract. (Appendix "A", Report of Pete Phillipi and Joseph Yablonski, bearing date on the 16th day of November 1955.)

The employer, Eastern Coal Corporation, became dissatisfied with the method that it was required to use in furloughing the plaintiffs and filed complaint with the International Union. (See Appendix "B", Report of Tom Raney, International Executive Board Member, dated June 7, 1955.)

These plaintiffs were cut-off or furloughed from employment at Eastern's Mines Nos. 4 and 8, and were replaced by employees of Eastern Coal Corporation that had been transferred from Eastern's Mine No. 7, in June 1953, and thereafter. The employees retained in the places of these plaintiffs had less service in mines Nos. 4 and 8 than the plaintiffs.

These aggrieved plaintiffs acting through and by a committee met with Eastern's Mine Management and Officials and requested that the terms of the contract be honored, and that they be retained in the employment of Eastern because they had more service in Eastern's Mines Nos. 4 and 8, than the employees by whom they were being replaced.

On each visit with the officials and management of the Mines, these plaintiffs were told that it, *Eastern Coal Corporation, had to go along with the Officials of the Local Union.*

Eastern refused to honor its contracts with the plaintiffs and refused to retain them in its employment.

The committee representing the plaintiffs appealed to the "Mine Committee" requesting that a grievance be filed as provided for in the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952, as amended, for settlement of Local and District disputes.

The "Mine Committee" arbitrarily refused to take the matter up with mine management, and refused to file a grievance. The "Mine Committee" informed the plaintiffs that the question of seniority had been

settled with Eastern under a *Local Seniority Agreement,* and that a grievance referable to the District did not exist.

Upon refusal of the "Mine Committee" to present formal grievances, the plaintiffs appealed to District 17, requesting that the "Mine Committee" be required to present formal grievances so that the dispute could be settled and determined in the manner provided for in settlement of Local and District disputes as set out in paragraph eight (8) of the seniority provision of the contract.

District 17, of the United Mine Workers of America sustained the ruling of the "Mine Committee" and held that the dispute was properly settled according to the *alleged Local Seniority Agreement made and entered into between Eastern Coal Corporation and the Local Union.* (See Appendices "A and B".)

The decision of District 17, was appealed to the International Executive Board of the United Mine Workers of America. The International Executive Board appointed commissioners to investigate and make report of its findings concerning the dispute existing at Eastern's mines. On June 7, 1955, and on November 16, 1955, the commissioners made findings and reported to the International Executive Board that there was in existence a *Local Seniority Agreement between Eastern Coal Corporation and the Local Union Officials.* (See Appendices "A and B".)

Further, in his report of June 7, 1955, Mr. Tom Raney, Executive Board Member, in reporting his findings, reported that *representatives of District 17,*

and assisted the Local Union Officers and Eastern Coal Corporation in writing up and agreeing to the Local Seniority Agreement in existence at Eastern Coal Corporation mines. (See Appendix "A".)

The International Executive Board sustained the ruling of District 17, as a result of which the plaintiffs were denied the right to have the dispute settled as provided for in the contract for the settlement of Local and District disputes.

As it had in the past, Eastern Coal Corporation continued mining in Pike County, Kentucky, in its three (3) separate mines.

On June 24, 1954, Eastern certified to the Kentucky Department of Mines and Minerals that it operated Mine No. 4, at McAndrews, Kentucky; that it operated 2 shifts per 24 hours; that it employed 164 men at its Mine No. 4; that its average production was 1500 tons per 24 hours operation; that its foreman was "John O'Brien"; that there was no change in the name and designation of the mine.

On May 11, 1954, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 7, at McVeigh, Kentucky; that it employed 140 men in the mine; that it worked two (2) shifts; that its average production was 1500 tons per 24 hours; that its foreman was "Harold Brodgon"; and that there was no change in name or designation.

On or about April 22, 1954, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it employed 234 men at its Mine

No. 4; that it operated 2 shifts; that its foreman was John O'Brien; and that there was no change in name or designation.

On September 23, 1954, Eastern Coal Corporation certified the Kentucky Department of Mines and Minerals that its Mine No. 7, was located at McVeigh, Kentucky; that it employed 170 men in the mine; that it operated two (2) shifts at the mine; that its average production was 1450 tons per 24 hours; that its foreman was Harold Brodgon; and that there was no change in name or designation.

On June 22, 1955, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 4, at McAndrews, Kentucky; that it employed 290 men in the mine; that it operated three (3) shifts per 24 hours; and that its foreman was Harold Brodgon.

On February 22, 1955, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its mine No. 4, at McAndrews, Kentucky; that it employed 232 men in the mine; that it operated 3 shifts per 24 hours; that its average production was 1800 tons per 24 hours; that its foreman was "John O'Brien"; and that there was no change in name or designation.

On March 14, 1955, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 7, at McVeigh, Kentucky; that it employed 226 men in the mine; that it worked two (2) shifts per 24 hours; that its foreman was John O'Brien; that its average pro-

duction was 1500 tons per 24 hours; and that coal from said mine was processed at the central cleaning plant located at its Mine No. 4.

On September 23, 1955, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 7, at McVeigh, Kentucky; that it employed 274 men in the mine; that it worked three (3) shifts; that it averaged producing 2200 tons per 24 hours; that its foreman was Bill Phillips; and that there was no change in designation or name.

On February 17, 1956, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 4, at McAndrews, Kentucky; that it employed 305 men in the mine; that it worked three (3) shifts per 24 hours; that it averaged producing 2800 tons per 24 hours; and that its foreman was Harold Brodgon.

On March 30, 1956, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 7, at McVeigh, Kentucky; that it employed 227 men in the mine; that it operated three (3) shifts per 24 hours; that it averaged producing 2100 tons per 24 hours; that its foreman was Wm. Phillips; as and to surface equipment. (See No. 4 Mine Inspection Report.)

On August 15, 1956, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 4, at McAndrews, Kentucky; that it employed 270 men at the mine; that it worked three (3) shifts per 24 hours; that it at the

mine; that it worked three (3) shifts per 24 hours; that it averaged producing 2500 tons per 24 hours; and that its foreman was Harold Brodgon.

On August 17, 1956, Eastern Coal Corporation certified to the Kentucky, Department of Mines and Minerals that it operated its Mines No. 7, at McVeigh, Kentucky; that it employed 234 men in the mine; that it worked three (3) shifts per 24 hours; that it averaged producing 2100 tons per 24 hours; and that its foreman was Mr. Phillips.

On January 1, 1957, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 4, at McAndrews, Kentucky; that it employed 270 men at the mine; that it operated three (3) shifts per 24 hours; that its average production was 2600 tons per 24 hours; and that its foreman was Harold Brodgon.

On June 21, 1957, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated Mine No. 7, at McVeigh, Kentucky; that it employed 235 men; that it worked three (3) shifts; that it averaged producing 2300 tons per 24 hours; and that its foreman was Wm. Phillips.

On August 7, 1957, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated Mine No. 4, at McAndrews, Kentucky; that it employed 290 men at the mine; that it operated three (3) shifts per 24 hours; that it averaged producing 2700 tons per 24 hours; and that its foreman was Harold Brodgon.

On November 18, 1957, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 7, at McVeigh, Kentucky; that it employed 300 men at the mine; that it worked two (2) shifts per 24 hours; that it averaged producing 2000 tons per 24 hours, and that the foreman of the mine was Wm. Phillips.

On January 21, 1958, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated Mine No. 4, at McAndrews, Kentucky; that it employed 280 men in mine; that it worked two (2) shifts per 24 hours; that it averaged producing 2700 tons per 24 hours; and that the foreman of the mine was Harold Brodgon.

On January 22, 1958, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 8, McAndrews, Kentucky; that it employed 40 men; that it operated the mine two (2) shifts per 24 hours; that it averaged producing 700 tons per 24 hours; that its foreman was Harold Brodgon; and that its name and designation was unchanged.

On October 7, 1958, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 4, at McAndrews, Kentucky; that it employed 246 men in the mine; that it worked two (2) shifts per 24 hours; that it averaged producing 3100 tons per 24 hours; that its foreman was Harold Brodgon; and that its name was unchanged.

On December 12, 1958, Eastern Coal Corporation certified to the Kentucky Department of Mines and

Minerals that it operated Mine No. 7, at McVeigh, Kentucky; that it employed 116 men in the mine; that it operated two (2) shifts; that it averaged producing 1000 tons per 24 hours; and that its foreman was Wm. Phillips.

On January 27, 1959, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated its Mine No. 4, at McAndrews, Kentucky; that it employed 246 men in the mine; that it worked two (2) shifts; that it averaged producing 3200 tons per 24 hours; that its foreman was Harold Brodgon; and that there was no change in name or designation.

On March 24, 1959, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated Mine No. 7, at McVeigh, Kentucky; that it employed 94 men in the mine; that it worked two (2) shifts; that it averaged producing 1100 tons per 24 hours; and that the foreman of the mine was Wm. Phillips.

On March 29, 1959, Eastern Coal Corporation certified to the Kentucky Department of Mines and Minerals that it operated Mine No. 8, at McAndrews, Kentucky; that it employed 84 men; that it worked two (2) shifts; and that it averaged producing 1000 tons per 24 hours; and that its foreman was Harold Brodgon.

On April 17, 1956, Eastern Coal Corporation certified to the Federal Bureau of Mines that it operated Mine No. 7, at McVeigh, Kentucky; that it worked

three (3) shifts; that it averaged producing 2100 tons per 24 hours; and that it employed 265 men in the mine.

On July 11, 1956, Eastern Coal Corporation certified to the Federal Bureau of Mines that it operated Mine No. 4, at McAndrews, Kentucky; that it employed 315 men in the mine; that it averaged producing 2400 tons per 24 hours; and that it worked three (3) shifts.

On December 3, 1956, Eastern certified to the Federal Bureau of Mines that it operated Mine No. 4, at McAndrews, Kentucky; that it worked three (3) shifts; that it employed 315 men in the mine; and that it averaged producing 2700 tons per 24 hours.

On December 10, 1957, Eastern Coal Corporation certified to the Federal Bureau of Mines that it operated Mine No. 4, at McAndrews, Kentucky; that it employed 278 men in the mine; that it worked three shifts; and that it averaged producing 2500 tons per 24 hours.

On December 19, 1957, Eastern Coal Corporation certified to the Federal Bureau of Mines that it operated Mine No. 7, at McVeigh, Kentucky; that it worked three (3) shifts; that it employed 258 men in the mine; and that it averaged producing 2360 tons per 24 hour shift.

(For all of the above see Mine Inspection Reports, Exhibits "D", "E", "F," "G", and "H" in the original record transmitted to this Court.)

Upon rehiring men from the idle panel in February 1962, Eastern continued its practice of assigning men to work in its separate mines Nos. 4 and 7. (See Eastern Coal Corporation's Form No. 21, Exhibit C, C-1 and C-2 in the original record transmitted to this Court.)

The United Mine Workers of America acting through its District President, R. O. Lewis, recognized and acknowledged the existence of Eastern's separate mines through January 1961. (See Appendices "C", "D", and "E".)

ARGUMENT.

PROPOSITION No. 1.

The Officers of Local Union No. 5737, did not have the authority to waive, abrogate or deprive the plaintiffs of seniority rights accrued under the terms of the then existing collective bargaining agreement during the existence of said agreement without the benefit of amended or supplemental agreement.

Authorities.

Herbert Bridges v. F. H. McGraw & Company, (Ky., 1957), 502 S. W. 2d 109.

Hill v. United Public Workers of America (Ky., 1950), 236 S. W. 2d 887.

Piercy v. Louisville & Nashville Ry. Co. (Ky.), 248 S. W. 1042.

N.L.R.B. v. Union Pacific, 99 Fed. 2d 153.

Gatliff Coal Company v. Cox (Ky.), 142 Fed. 2d 876 (6th Cir.).

Discussion.

Collective bargaining agreements are made for the benefit of the individual members as well as to stabilize industry. During the existence of a collective bargaining agreement the individual member has the right to

rely upon its terms in being informed as to what his rights thereunder are. He has the right to the benefits obtained by reason of the agreement until the agreement has been amended, supplemented or changed. If this were not true, the collective bargaining agreement would be meaningless to the worker. The rights of benefits thought to be his could be wiped out by the majority of the union members without notice or justifiable reason.

These plaintiffs do not question the right of the collective bargaining agent to negotiate amended, supplemental or new collective bargaining agreements in which including seniority provisions are changed. Further, they realize that the collective bargaining agent is to represent the whole membership. However, it is their contention that until an amendment or change has been effected that they as individuals have the right to enjoy the benefits obtained under the terms of the existing contract.

In the case before the Court the collective bargaining agreement was in existence and its provisions pertaining to seniority remained unchanged until 1964. There is mention of a local seniority agreement in Appendix "A," but its existence has never confirmed.

In making preparation for the reduction of its working forces at its Mines Nos. 4 and 8, Eastern Coal Corporation knowing that it operated three (3) mines in Pike County, Kentucky, undertook to comply with the terms of the Agreement and furloughed the men that were last transferred to its Nos. 4 and 8 mines.

The "Mine Committee" with the assistance of the officers of District Seventeen (17) insisted that the payroll seniority plan be put in effect. Although Eastern later complied with this request, it filed a complaint with the International Executive Board. (See Appendix "A".)

It has been consistently held in Kentucky that unions and their officers are agents of members for the purpose of securing for its principals (members) fair and just remuneration for their labor and favorable conditions under which to perform it. They are not agents of the members for the purpose of adjusting the individual rights acquired by members in their contracts with employers, nor can the union or its officers change or waive any personal rights of members.

In Hill, *et al.* v. United Public Workers of America, *et al.* (Ky., 1950), 236 S. W. 2d 887, the Court said:

> "These several labor unions which are voluntary unincorporated associations, are entities for limited contractual purposes only. They are clothed with power by their members to make agreements with employers respecting wages, working conditions and related labor questions, and within their legitimate scope such are binding upon the union as an entity and the membership thereof. Saulsberry v. Coopers International Union (Ky.), 143 S. W. 1018. The necessity of stability demands that without it there would be no security or permanency. But the Union may not act in any particular way so as to effect injuriously the personal rights of its members.

A member does not have to submit to the determination of the Union in any question involving his personal rights. Piercy v. Louisville & Nashville R.R. Co. (Ky.), 248 S. W. 1042. As recently expressed in Louisville Ry. Co. v. Louisville Area Transport Workers Union (Ky.), 228 S. W. 2d 652 the Union is the agent and servant of its members, and the membership does not exist for the benefit of the union. Some courts regard a bargaining agreement as one made by the Union for the benefit of third persons, its members, but we are committed to the concept of agency. Aulich v. Craigmyle (Ky.), 59 S. E. 2d 560."

In Herbert Bridges v. F. H. McGraw & Company (Ky., 1957), 302 S. W. 2d 109 the Court said:

"The agreement establishes no concrete contract between the employer and employee, but is only an agreement as to the terms on which contracts of employment may be satisfactorily made and carried out. 31 Am. Jur. Labor Sec. 97. It is contemplated that those terms are to be incorporated in separate contracts of hire with each employee. McKay v. Lowes, Inc., 182 F. 2d 170, 18 ALR 2d 348. When one accepts employment under the collective bargaining agreement, he thereby ratifies and accepts its terms, and his rights and his employers rights are to be measured and adjudged by that contract. McGregor v. Louisville & Nashville Ry. Co. 244 Ky. 696, 51 S. W. 2d 1953. In some relations the Union contracts as a principal but, as we have written a labor union exists for the benefit of its members, and is their servant in securing fair and just wages and

good working conditions though it may not bind the member in the exercise of his personal rights. Piercy v. Louisville & Nashville Ry. Co. (Ky.), 248 S. W. 1042; Hill v. United Public Workers of America (Ky.), 236 S. W. 2d 887."

In Piercy v. Louisville & Nashville Ry. Co. (Ky., 1923), the Court said:

"The primary purpose of the organization of labor unions and kindred organizations is to protect their individual members and to secure for them fair and just remuneration for their labor and favorable conditions under which to perform it. Their agreements with employers looks always to the securing of some right or privilege for their individual members, and the right or privilege so secured by the agreement is the individual right of the individual member and such organization can no more by its arbitrary act deprive that individual member of his right so secured than can any other person. The organization is not the agent of the member for the purpose of waiving any personal right he may have, but is only his representative for the limited purpose of securing for him, together with all other members, fair and just wages and working conditions. Hudson v. C.N.O. & T.P. Ry. Co., 154 S. W. 47.

"If the right of seniority may be changed or waived or otherwise dispensed with by the act of a bare majority of an organization to which the one entitled thereto is a member, it would be builded on a flimsy foundation of sand which might slip from under him at anytime by the arbitrary action of members, possibly to serve their own selfish ends in displacing him."

PROPOSITION No. 2.

The officers of Local Union No. 5737 did not have the authority to enter into a local seniority agreement with Eastern involving mine seniority, and in fact were forbidden to do so under the terms and provisions of the "National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952, effective October 1, 1952, and as amended thereafter."

Authorities.

International Longshoresman's & Warehousemen's Union v. Kuntz, 334 F. 2d 165, 171.

Discussion.

In the National Bituminous Coal Wage Agreement of 1950, effective March 5, 1950, the following provision was inserted:

> "This Agreement supersedes all existing and previous contracts except as incorporated and carried forward herein by reference; and all local agreements, rules, regulations, and customs heretofore established in conflict with this agreement are hereby abolished.
>
> "Wherever a conflict arises between this Agreement and any District or Local Agreement, this Agreement shall prevail."

This provision was carried forward as a part of the Collective Bargaining Agreement of 1950, as amended September 29, 1952, effective October 1, 1952.

The National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, contained the seniority provision giving rise to the dispute in question.

In paragraph two (2) of the seniority section of the contract it was provided that, *"In all cases where the working force is to be reduced, employees in each job classification at a mine with least service shall be laid off first."* (Emphasis ours.)

Further, in paragraph 7, of the seniority section of the contract it states that, *"in two or three-shift operations the question of seniority with regard to work on the respective shifts shall be left to the discretion of the contracting parties at the mine in question."* (Emphasis ours.)

It is clear that the contracting parties intended to, and did eliminate the necessity the exercise of discretion in determining seniority rights. By its terms the parties were required to look at the hiring dates of men in the affected mine and furlough those with least service in that mine. The parties bargained against the exercise of the use of discretion.

Further, it is clear from the terms of the contract that local union authority respecting seniority to shift seniority. It is specifically set out therein in the question of shift seniority could be agreed upon by the local union and the operator. Also, by enumerating this authority to be vested in the local union the contract limited the local union's authority and forbade it to negotiate with respect to mine seniority.

Any local payroll seniority agreement in existence or thereafter created was in conflict with the National Wage Agreement and void. The Local Union was forbidden to act in this area, but did so undertake to act to the detriment of these plaintiffs.

PROPOSITION No. 3.

Under the terms National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952, management retained the right to determine the number of mines, and the location of the mines that it would operate without union interference.

Authorities.

United Steel Workers of America v. Warrior & Gulf Navigation Company (1960), 80 S. Ct. 1347, 363 U. S. 574.

Discussion.

Collective bargaining agreements may regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires, fires, pays, promotes, supervises and plans. All of these are a part of its function, and absent a collective bargaining agreement to the contrary, it may be exercised freely except as limited by public law and by the willingness of employees to work.

The National Coal Wage Agreement of 1950, as amended September 29, 1952, carried forward and preserved the provision in the contract entitled "Man-

agement of Mines." The Agreement provides that *"the management of the mine, the direction of the working force, the right to hire and discharge are vested exclusively in the operator and United Mine Workers of America shall not abridge these rights."* (Emphasis ours.)

Eastern Coal Corporation's reservation of the right to manage included its right to determine how many producing units it would operate in Pike County, Kentucky. In this same contractual provision, the union contracted against its right to interfere with management in area.

Upon negotiating the contract in question it is clear that the United Mine Workers of America and the operator's association recognized the fact that there were in existence employers or an employer such as Eastern that operated two or more mines.

In their consideration of the question of seniority, a decision had to be made between the choice of mine seniority or payroll seniority.

In the National Bituminous Coal Wage Agreement of 1950, as amended September 29, 1952, effective October 1, 1952, the parties to the contract agreed upon the mine seniority provision.

As to those employers operating two or more designated mines, it is clear that the seniority provision, Section 2 contemplated that each of said employers agreed with each employee that he would have and acquire seniority in each designated mine based upon his employment in a particular or designated mine.

The mine referred to was one so designated by the employer. There was no provision in the contract for the designation of mines by the United Mine Workers.

In the case before the Court, Eastern Coal Corporation operated mines in Pike County, Kentucky and designated them as being mines Nos. 4, 7, and 8. In United Steel Workers of America v. Warrior & Gulf Navigation Company, 80 S. Ct. 1347, 363 U. S. 574 (1960), the United States Supreme Court recognized certain rights of management. In that case the Court said:

> "Collective bargaining agreements regulate or restrict the exercise of management function; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All of these are a part of its function."

That Eastern had the right to plan the operation of its mines and distinguish between them as it did is beyond question. Prior to and after the underground connection of Mines Nos. 7 and 8, Eastern Coal Corporation continued to operate and designate them as separate and distinct mines.

Eastern Coal Corporation continued separate mine inspection reports to the Department of Mines of the Commonwealth of Kentucky, and to the Federal Bureau of Mines. Eastern Coal Corporation reported tonnage mined and working conditions in its inspection report as to each of its mines. Eastern employed separate mine foremen for its Mines Nos. 8 and 7, and as late as 1962, the records show that Eastern Coal Cor-

poration upon hiring men assigned them to work in its specific numbered mines. It is inconceivable that all of these records are incorrect with respect to the manner in which Eastern operated its mines in Pike County.

We find nothing in the contract giving the union power to determine how the employer should operate its mines so long as it complies with the provisions contained in the contract. These appellants were compelled to abide by the decision of the employer with respect to the mine to which they were assigned for work. They had the right to seniority based upon the employers assignment to work in one of its designated mines.

It is not the contention of the appellants that Eastern's Mine No. 7 lost its identity at any time, as mentioned by the Appellate Court in its opinion. To the contrary, the documented evidence clearly establishes that Eastern continued the operation of its No. 7 Mine. The inspection reports, designation of mine foreman, and Eastern's "Form 21," all support the position of the appellants that management continued the operations of its Nos. 4, 7 and 8 mines through February, 1962. Further, it is evident that the Union knew of Eastern's continued operation of its separate mines as attested by correspondence of the Union addressed to its local union relating to safety inspection reports.

PROPOSITION No. 4.

The Court of Appeals of Kentucky misapplied the principles of Aeronautical Lodge v. Campbell, Ford Motor Company v. Huffman and Moore v. Humphrey to the facts in this case.

Authorities.

Ford Motor Co. v. Huffman, 345 U. S. 330, 97 L. Ed. 1048, 73 S. Ct. 681 (1952).

Humphrey v. Moore, 375 U. S. 335, 84 S. Ct. 363 (1964).

Aeronautical Lodge v. Campbell, 337 U. S. 521, 93 L. Ed. 1513, 69 S. Ct. 1287 (1948).

Discussion.

In rendering its judgment in this case the Court of Appeals of Kentucky relied heavily upon the decision of the Supreme Court of the United States in Ford Motor Co. v. Huffman, Aeronautical Lodge v. Campbell, and Moore v. Humphrey. In its opinion the Court said:

> "But we need not construe the contract ourselves. Applying the Federal Law as we construe it from the principles stated in the Supreme Court opinions herein cited (referring Ford Motor Co. v. Huffman, Aeronautical Lodge v. Campbell and Moore v. Humphrey), and there being neither fraud no bad faith, as bargaining representative for its members the union had the right and power to resolve this purely intra-union, problem and, in the course of so doing, to effect an agreement with Eastern either interpeting or amending the contract accordingly. If a bargaining representative may alter seniority rights secured by both contract and statute, as in Ford Motor Co. v. Huffman, 345 U. S. 330, 97 L. Ed. 1048, 73 S. Ct. 681 (1952) surely it may do so when the rights are secured by contract only."

The facts in the case before the Court are so different that the above quotation clearly establishes the misapplication of principles. In the cases relied upon there were amended and supplemental collective bargaining agreements made and exhibited to the Courts. Those decisions did not alter rights secured by the selective training and service act. The Court found that the Act intended to preserve such seniority rights as provided for in the agrement.

These appellants have not, do not now contend that collective bargaining agents do not have the authority to amend collective bargaining agreements from time to time as conditions may dictate. However, they do contend that they are entitled to benefits contracted for during the existence of the contract.

In Aeronautical Lodge v. Campbell, 337 U. S. 531, 93 L. Ed. 1513, 69 S. Ct. 1287, the pertinent facts were that Aeronautical Industrial Lodge No. 727, was the duly recognized collective bargaining agent for the employees at Lockheed Aircraft Corporation, 1941, the union or bargaining agent had negotiated an agreement with Lockheed covering the range of subjects touching conditions of employment typical of such agreements in the aircraft industry. This agreement contained seniority provisions. This agreement was in effect when the aggrieved employees entered the employ of Lockheed Aircraft Corporation in August, 1942. Upon entering the employ of Lockheed the aggrieved employees joined the union and remained members throughout the controversy. Two years later the aggrieved employees left the employment of Lockheed

and entered the army. While they were in the service the union *negotiated a new contract* that included a change in the seniority provisions or which modified the 1941 Agreement. Upon discharge from the service the aggrieved employees were restored to their jobs in accordance with the Selective Service Act. In the latter part of 1946, the aggrieved employees were furloughed and they attacked the right of the union to change or modify the seniority provisions of the 1941 Agreement. Also, they asserted their right to protection under the Selective Service Act.

In Ford Motor Co. v. Huffman, 345 U. S. 330, 97 L. Ed. 1048, 73 S. Ct. 681, the pertinent facts are that Huffman, the aggrived employee entered the employ of Ford Motor Company in September, 1943. At the time of his employment, there was in existence a collective bargaining agreement entered into between Ford Motor Company and the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, that contained certain seniority provisions based upon length of employment with Ford Motors and with credit for military service. Huffman was inducted into the army in November, 1944, and was discharged July, 1946, and within 30 days was reemployed by Ford Motors with seniority dating from September, 1943, the date of his employment.

On the 30th day of July, 1946, Ford and the International Union executed a supplementary agreement containing the following language in Section 13, thereof:

"(C) Any veteran of World War II who was not employed by any person or company at the time of entry into the service of the land or naval forces or the merchant marine and who is a citizen of the United States and served with the allies and who has been honorably discharged from such training and service and who is hired by the company after he is relieved from training and service in the land or naval forces or after completion of service in the merchant marine, shall upon having been employed for six months and not before, receive seniority service credit for the period of such service subsequent to June 21, 1941."

The effect of this provision was that whereas, Huffman's seniority, and that of members of his class was computed from the respective dates of employment with Ford, and having been credited with their military service, if any, were surpassed in seniority, in many instances, by employees who entered the employ of Ford after they did, but who had entered the service before the date of employment of Huffman by Ford and given credit for the time so spent in service.

Huffman complained of the seniority provision in the supplementary agreement of July 30, 1946, asserting that the same was an unauthorized amendment of the collective bargaining agreement and prohibited by the Selective Service Agreement. In each of the cases the Court sustained the right of the bargaining agent to amend agreements and the seniority provisions therein contained. The Court reiterated its findings that the Selective Service Act did not purport to create seniority rights but, merely to secure unto servicemen such

seniority provisions as were contained in collective bargaining agreements. Further, the Court held that the provision was legitimate and that the union had the authority to accept the provision.

In each of the above cases the aggrieved persons sought to invoke the provisions of the Selective Service Act in their behalf. The Court merely held that the Congress was not creating a system of seniority but recognized its operation as a part of the process of collective bargaining.

It is extremely noticeable that in each of the above cases that there had been an amended or supplementary agreement entered into between the employer company and the union as agent for each of its members. Each of the employees was appraised of the rights secured to him under the provisions of the negotiated contract and upon entering or remaining in the employment of the employer under the contract ratified, accepted and was bound by the terms thereof. To have held that labor contracts cannot be amended or supplemented would have been unreasonable.

In the case before the bar, it is very noticeable that the contract was not amended, nor was there a supplementary agreement entered into. The appellant—employees are not complaining of the right to amend or supplement but, of the authority to waive or disregard the rights secured unto each of them under the terms of a then existing contract in clear and unambiguous language.

The evidence is that the Executive Committee of the United Mine Workers of America appointed a com-

mission composed of William Blizzard, George Titler, and Tom Raney, to investigate a complaint made by Lawrence E. Tierney, President of Eastern Coal Corporation, wherein he complained of the method in which the seniority agreement was being applied. On June 7, 1955, Tom Raney acting for the commission, reported that upon evidence as submitted by the mine committee and local officers that there had been a local seniority agreement between the management of the company and the mine committee and local union, and that district 17 had assisted in writing up and agreeing to the local seniority agreement. (See Exhibit D.) Also the commission appointed on July 7, 1955, in making a report of its findings stated that the president of Local Union No. 5737, stated that there was an understanding on seniority between mine management and officers and committees of both Local Union.

Neither of the reports indicate that there was an authorized amendment to contract affecting seniority, nor has the United Mine Workers offered the alleged writing referred to in the report of June 7, 1955, for the consideration of the Court. Further, by the terms of the contract (Seniority Section 7) the authority of the Local Unions to act on matters of seniority was expressly restricted to matters of work on respective shifts.

In Humphrey v. Moore, *ibid,* the question to be resolved was whether the "Local Joint Committee" and the "Joint Conference Committee" exceed the authority vested in them by the Collective Bargaining

Agreement by dovetailing seniority between the employees of Dealers and the former employees of E. & I. Transport Companies. Article 4, Section 5, of the contract in question in that case provided among other things as follows:

> "In the event that the employer absorbs the business of another private, contract or common carrier, or is a party to a merger of lines, the seniority of the employees absorbed or affected thereby shall be determined by mutual agreement between the Employer and the Unions involved. Any controversy with respect to such matter shall be submitted to the joint grievance procedure."

The Court held that the provisions of the contract conferred upon Local Joint Committee and the Joint Conference Committee to exercise discretion in absorption cases, and that the committee did not abuse the authority vested in them. The case before the Court is quite different.

In the National Bituminous Coal Wage Agreement of 1950 as amended September 29, 1952, effective October 1, 1952, the parties expressly contracted against the use of discretion in determining the seniority rights of an employee.

In the seniority provision, Section 2, it provided that,

> "In all cases where the working force is to be reduced, employees in each job classification at a mine with least service, shall be laid off first."

In Section 6, of the same provision it is provided that,

"The Superintendent of the mine and the Secretary of the Local Union shall be joint custodians of the panel record."

By language of the agreement the question of determining seniority became ministerial. The only act required was consulting the panel or employment record with a view of ascertaining who had most service in a particular mine. The contract left nothing uncertain or over which to bargain.

Further, in Section 7, of the same provision (seniority) the parties limited the authority of the Local Union in dealing with seniority to shift seniority. It was not vested with the authority to negotiate or determine job seniority and any effort to do so constituted an abuse of its power to the detriment of these plaintiffs without any further showing. The local union undertook to do something that it was forbidden to do.

The union undertook to justify its action in the matter on the basis of necessity because of the provision in the United Mine Worker's Constitution which provides that no mine shall be under the jurisdiction of more than one Local Union. The consideration of the Local Union was purely a matter for union determination. However, we wish to point out that there isn't any prohibition of one or more mines being under the jurisdiction of one Local Union. In fact, it is very prevalent in the mining industry where two or more mines of a common employer in close proximity to each other are under the jurisdiction of a single Local Union. It appears from the record that one Local Union served two (2) or more of Eeastern's mines for a long space

of time. Since Eastern continued the operation of its separate mines there existed no necessity for consolidation. Notwithstanding, the merger or consolidation of local unions did not prevent the union from recognizing the provisions of the contract relating to mine seniority.

CONCLUSION.

Upon the record, and the law as it has often been decided by the Supreme Court of the United States of America, we respectfully submit that this Court should grant the writ prayed for and reverse the cause and render judgment that Eastern violated its contracts with the plaintiffs, and that the United Mine Workers of America wrongfully interfered with the plaintiffs' contracts, and in so doing violated its fiduciary obligation as their agent.

Respectfully submitted,

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Counsel for Petitioners.

Certificate of Service.

It is hereby certified that the foregoing Petition has been served upon the opposing counsel by mailing a copy thereof to John M. Stephens, Esquire, Attorney at Law, Pikeville, Kentucky; to George Richardson, Jr., Esquire, Attorney at Law, Law & Commerce Building, Bluefield, West Virginia; to Albert S. Kemper, Jr., Attorney at Law, Box 370, Bluefield, West Virginia; to J. Erwin Sanders, Esquire, Attorney at Law, Pikeville, Kentucky; to Harrison Combs, Esquire, Attorney at Law, 990 Fifteenth Street Northwest, Washington, D. C.; to H. B. Noble, Esquire, Attorney at Law, Hazard, Kentucky, and to M. E. Boiarsky, Esquire, Attorney at Law, 511 Kanawha Valley Building, Charleston, West Virginia, and to the Honorable James B. Stephenson, trial judge, Pikeville, Kentucky.

This ____ day of September, 1967.

JEAN L. AUXIER,
Attorney for Petitioners.